**JD(ATL)–22–06**
**Baton Rouge, LA**

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**ATLANTA BRANCH OFFICE**

**BASIC INDUSTRIES, INC.**

**and** **CASES 15–CA–17525**
**15–CA–17701**
**15–CA–17707**

**INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS LOCAL 53**

***Beauford D. Pines, Esq.***, for the General Counsel
***Mr. Mauro Carrasco*** , for the Charging Party
***G. Mark Jodon, Esq. and J. Daniel Rodriguez, Esq. (Littler Mendelson, P.C.)***, of Houston, Texas, for the Respondent

## DECISION

### Statement of the Case

**KELTNER W. LOCKE, Administrative Law Judge**: In this case, the General Counsel alleges that the Respondent discriminated against four employees in violation of Section 8(a)(3) and (1) of the Act. Because of my credibility determinations, I recommend that the Board dismiss the Complaint in its entirety.

### Procedural History

This case began on October 19, 2004, when the International Association of Heat and Frost Insulators and Asbestos Workers, Local 53 (the "Union" or "Charging Party") filed an unfair labor practice charge in Case 15–CA–17525 against Basic Industries, Inc. ("Respondent"). The Union amended this charge five times: On October 21, 2004, January 27, 2005, March 3, 2005, March 7, 2005 and April 12, 2005.

On April 29, 2005, the Union filed against Respondent the unfair labor practice charge which began Case 15–CA–17701. On May 9, 2005, the Union filed another charge, docketed as Case 15–CA–17707. Respondent admits that all charges were served on the dates alleged by the General Counsel.

On June 28, 2005, the Regional Director for Region 15 of the Board issued a Complaint against Respondent in Case 15–CA–17525. On July 19, 2005, the Regional Director issued an

Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which, for brevity, I will call the "Complaint."

On January 30, 2006. a hearing in this matter opened before me in Baton Rouge, Louisiana. On that day and the two following days, the parties presented evidence. After receipt of the transcripts of those proceedings, counsel gave oral argument on February 23, 2006.

## Admitted Allegations

Respondent's Answer to the Consolidated Complaint and Notice of Hearing (the "Answer") admitted many of the allegations. Based upon those admissions, I make the following findings.

The charges and amended charges were filed and served as alleged in Complaint paragraphs 1(a) through 1(h).

At all material times, Respondent has been a corporation with an office and place of business in Baton Rouge, Louisiana, and has been engaged in providing insulation services. It's business operations have been sufficient to satisfy both the statutory definition of an employer engaged in commerce and the Board's discretionary standards for exercise of its jurisdiction.

At all material times, the following persons have been supervisors of Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Personnel Manager Logan Barrow; Safety Coordinator Travis Chaney; Site Manager J. W. Courtney; Project Manager Chris Langlois; Supervisor Greg Langlois; Foreman Chris Mahon; Foreman Ricky Price; Corporate Safety Officer Jack Rhodus; Insulator Foreman Jeff Sarow; Foreman and (subsequently) Labor Recruiter Juvenile Torres; Insulator Foreman Brian Tranchina; and General Foreman Larry Usea.

On about September 27, 2004, Respondent laid off employees Oscar Madrid and Jorge Pinto, as alleged in Complaint paragraph 7.

On about April 26, 2005, Respondent discharged employee Jorge Chavez, as alleged in Complaint paragraph 8.

On May 6, 2005, Respondent discharged employee Norberto Hernandez. Respondent states that it discharged Hernandez for absenteeism. Respondent has not reinstated Hernandez to his former position of employment.

## Contested Allegations

### The Union's Status

Complaint paragraph 5 alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. Respondent's Answer states that it is without knowledge. This statement constitutes a denial under Section 102.20 of the Board's Rules and Regulations.

Section 2(5) of the Act defines "labor organization" broadly to include any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Although it would surprise me if the Union here failed to meet that test, I must base my finding upon evidence. It concerns me that the record says little about the reason Local 53 exists or its purposes.

However, no one appears to dispute that employees reasonably would consider the Union to be a "labor organization." Therefore, discrimination against an employee because of membership in Local 53, or activities on its behalf, foreseeably would discourage employees from forming, joining, or assisting both this Union and others which clearly do fall within the statutory definition. Thus, the discrimination alleged in the present Complaint, if proven, certainly would implicate Sections 8(a)(1) and (3). Although I recommend below that the Board dismiss the Complaint, that recommendation does not turn on the Union's Section 2(5) status.

**The Layoff Allegations**

Respondent's Answer admits that on about September 27, 2004, it laid off employees Oscar Madrid and Jorge Pinto. It denies that these layoffs violated the Act.

Whether the layoffs were lawful depends on Respondent's motivation. I will discuss that issue below.

**The Discharge Allegations**

Respondent's Answer admits that on about April 28, 2005, it terminated the employment of Jorge Chavez, as alleged in Complaint paragraph 8. However, Respondent denies that it did so because these employees assisted the Union and engaged in concerted activities, or to discourage employees from engaging in these activities, as alleged in Complaint paragraph 14.

Complaint paragraph 13 alleges that Respondent discharged employee Norberto Hernandez on about May 9, 2005. Respondent's Answer states: "The allegation contained in paragraph 13 of the Complaint is denied, because Basic terminated Norberto on May 6, 2005 for absenteeism."

Thus, although Respondent denies it discharged Hernandez on May 9, 2005, it admits it did so three days earlier. However, Respondent denies that this action violated the Act. The lawfulness of Hernandez' discharge therefore depends on Respondent's motivation, which I will discuss below.

**The Failure to Reinstate Allegation**

In addition to alleging that Respondent discharged Norberto Hernandez because of his Union activities and to discourage other employees from engaging in such activities, the Complaint separately alleges another type of discrimination against him. It alleges that he became an unfair labor practice striker on about May 2, 2005 and made an unconditional offer to return to work on May 9, 2005. It further alleges that Respondent failed to reinstate him.

This failure–to–reinstate allegation thus arises under a theory different from an employer's general obligation to reinstate any employee it discharged in violation of the Act. To prevail under this separate theory, the General Counsel first must prove that Hernandez did engage in an unfair labor practice strike. Should it succeed in establishing Hernandez' status as an unfair labor practice striker, the government then must prove that Respondent failed to reinstate him for an unlawful reason.

Respondent disputes Hernandez' alleged status as an unfair labor practice striker and thus denies that it had any obligation to reinstate him. These issues, as well as the question of Respondent's motivation, will be discussed below.

## Credibility

Two factors cause me to doubt the reliability of the testimony given by Jorge Chavez. On cross–examination, Chavez gave testimony inconsistent with his pretrial affidavit concerning with whom he had worked at a particular time.

Additionally, Chavez gave nonresponsive answers to a considerable number of questions. Had such nonresponsiveness been an isolated occurrence, it would reflect less on his credibility, but it happened too often to disregard as insignificant. For these reasons, I do not credit Chavez' testimony.

On cross–examination, Oscar Madrid also gave nonresponsive answers to certain questions. I do not credit his testimony to the extent it conflicts with other evidence.

Two other witnesses provided seemingly evasive responses to questions posed during cross–examination. In the case of Noberto Hernandez, these questions concerned why he had put an incorrect time on a sign–in/sign–out sheet. His responses cause me to doubt the reliability of his testimony.

Additionally, Hernandez often hesitated before answering questions. These pauses take on added significance when considered together with Hernandez' seemingly evasive answers to some questions. They raise doubts about how faithfully he adhered to the truth without regard to the consequences of his testimony. Therefore, I do not credit that testimony.

Additionally, I do not credit the testimony of Jorge Pinto. In part, my doubts about his testimony arise from the apparently defensive way he responded to some questions, notably those concerning the way he had completed his employment application. (Pinto claimed that he had received an asbestos certificate from the State of Louisiana, but he did not mention it on his employment application, even though it sought information about "any skills, licenses, or certificates that may be job–related.")

Other portions of Pinto's testimony raise greater concerns. Pinto testified that Christopher Langlois gave him permission to take off work for a week after Pinto told Langlois "that I was

going to visit some parents. . .” Pinto and Madrid then travelled to Las Vegas. While cross–examining Pinto, Respondent’s counsel sought more information about this trip:

**Q** Did you go to any boxing matches or fights while you were out there?
**A** That’s personal, sir. I can’t tell you. It was families.
**Q** Was it union business you went out there on?
**A** It was a personal issue.
**Q** Personal business? Is that what you’re telling me?
**A** Yes.

After further cross–examination, Pinto admitted that he and Madrid had attended a union organizing meeting in Las Vegas. Although Pinto had told Langlois that he was going to visit “some parents,” Pinto testified that he visited a sister.

Pinto’s lack of candor with his supervisor does affect my assessment of his credibility, but not nearly so much as his puzzling evasiveness at hearing. Obviously, Pinto might have been reluctant to tell his supervisor about his Union activity while he was still working for Respondent. However, that doesn’t explain Pinto’s reluctance to admit, on cross–examination a year and a half later, his participation in a union meeting.

Pinto’s evasiveness about attending the Union meeting is difficult to reconcile with his interest in the outcome of this proceeding. The Complaint alleged that Pinto had been laid off because of his Union activity, and Pinto therefore stood to gain reinstatement and back pay if such discrimination could be proven. At the unfair labor practice hearing, Pinto reasonably would be more likely to flout than conceal his attending a training meeting for Union organizers. Nonetheless, and inexplicably, Pinto disclosed the true purpose of his trip only after extensive cross–examination and my specific instruction to answer a question.

Pinto’s credibility suffers not only because he tried to evade answering a question, but also because of the way he tried to evade it. Pinto initially testified that he had been on “personal business” involving a “personal issue,” but, in fact, the Union had paid for the trip so that Pinto could attend to Union business. Pinto’s willingness to substitute a false reason for the real one calls into question his commitment to telling the whole truth and nothing but the truth.

Moreover, Pinto’s testimony during the hearing also conflicted in some respects with his pretrial affidavit. For example, Pinto had stated in an affidavit that there had been no morning meeting on September 24, 2004. However, Pinto testified on cross–examination that there had been a safety meeting on that date. For all these reasons, I do not credit his testimony.

## The Two Groups of Allegations

The Section 8(a)(3) and (1) allegations may be divided into two groups, which will be discussed below under separate headings.

First, the Complaint alleges that on about September 27, 2004, Respondent laid off employees Oscar Madrid and Jorge Pinto. The Complaint alleges that these layoffs violated Section 8(a)(3) of the Act.

The second set of 8(a)(3) allegations concern events in late April and early May 2005. The Complaint alleges that on about April 28, 2005, Respondent unlawfully discharged employee Jorge Chavez, that another employee, Norberto Hernandez, engaged in an unfair labor practice strike to protest this discharge, that Respondent refused to reinstate Hernandez after he made an unconditional offer to return to work, and that Respondent discharged Hernandez for unlawful reasons.

The Complaint also alleges that the layoffs of Madrid and Pinto, the discharges of Chavez and Hernandez, and the refusal to reinstate Hernandez violated Section 8(a)(1) of the Act. However, the Complaint does not allege that Respondent engaged in any other conduct which violated Section 8(a)(1).

**Layoff of Madrid and Pinto**

Respondent admits that on about September 27, 2004, it laid off employees Madrid and Pinto, as alleged in Complaint paragraph 7. However, it denies doing so for an unlawful reason.

In evaluating the lawfulness of these layoffs, I will follow the framework articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

Both Pinto and Madrid testified that they worked for the Union as organizers. No other evidence contradicted them on this point. Even though I have considerable doubt about much of their testimony, the circumstances of this case lead me to conclude that they were, as they said, employed by the Union.

Additionally, it seems plausible to conclude that Oscar Madrid did put a Union sticker on his hard hat on about September 23, 2004. Accordingly, I conclude that the General Counsel has established that Pinto and Madrid engaged in activities protected by the Act. Therefore, I further conclude that the government has proven the first *Wright Line* element.

Next, the General Counsel must prove that Respondent was aware of the protected activities. On September 23, 2004, the Union sent to Respondent, by facsimile, a letter identifying Pinto and Madrid as "volunteer organizers for Local #53." I conclude that, as of September 23, 2004,

Respondent knew about the Union activities of Pinto and Madrid. Therefore, I also conclude that the General Counsel has established the second *Wright Line* element.

Respondent has admitted that it laid off Pinto and Madrid on September 27, 2004. Accordingly, I conclude that the government has established that there was an adverse employment action, thereby satisfying the third *Wright Line* requirement.

The final *Wright Line* element concerns proof of unlawful motivation. More specifically, the General Counsel must demonstrate some connection between the protected activities and the adverse employment action. The government could satisfy the final *Wright Line* requirement with credible evidence that Respondent harbored hostility towards the Union.

Such evidence of antiunion animus varies from case to case, but typically may include statements by management which constitute threats or otherwise violate Section 8(a)(1) of the Act. In the present case, however, the Complaint does not allege any such independent violations of Section 8(a)(1).

Statements imputable to management also may establish animus even if such statements do not themselves violate the Act. However, the General Counsel has not argued that any specific supervisor or agent made any particular statement evincing such hostility to the Union. In any event, no credible evidence establishes that any of Respondent's supervisors or agents made such a statement.

The General Counsel argues that animus may be inferred from the timing of the layoffs. Without doubt, the Board may, in appropriate cases, infer animus from the timing of events. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002); *Masland Industries*, 311 NLRB 184, 197 (1993).

An inference of animus based on the timing of events implicitly assumes that the employer controls the timing of a particular adverse employment action. Only actions within an employer's control can reflect the employer's motivation. When an employer does have exclusive control over the interval between its discovery of protected activities and the layoff or discharge of an employee, a short interval may say something about the reason for the layoff or discharge.

The present case, however, is somewhat unusual. Here, the Union was engaged in a strategy known as "salting," in which organizers applied for jobs without revealing their union affiliation. The Union therefore had considerable control over when the Respondent became aware that Pinto and Madrid were organizers. The Union revealed their affiliation by sending a letter to Respondent by fax. The Union alone had control over when it would fax this letter and, therefore, when Respondent would become aware of the employees' activities.

The Union did not have similar control over the dates of the layoffs, but it reasonably would know in advance when those layoffs would occur, at least approximately. The record establishes that Respondent's work followed a consistent pattern of three phases called pre–turnover, turnover, and post–turnover. Layoffs typically occur at the end of the pre–turnover phase because some of the work during the turnover period requires different skills.

Respondent estimates well in advance the date when the pre–turnover phase will end and the turnover phase begin. Indeed, Respondent's site manager, Christopher Langlois, credibly testified that on September 15, 2004, 95 percent of the pre–turnover work had been completed. At that point Langlois could determine when the remaining work would be completed and, therefore, when the layoff would begin.

This knowledge was hardly a secret. Indeed, an experienced employee reasonably would know how much of his pre–turnover work remained to be done. Union organizers Pinto and Madrid were working at the jobsite as the pre–turnover phase neared completion. Through them, the Union acquired enough information to make its own estimate of when the turnover would occur.

Accordingly, the Union had some ability to determine the approximate interval between when Respondent became aware of the organizers' Union activities, and when the layoff would occur. It could make this interval short by waiting until just before the expected layoff to reveal its presence.

Before drawing any inference from the timing of events, a judge should have confidence that the employer, and the employer alone, controlled the timing. A union's power to affect timing erodes confidence even if the union doesn't use its power. The mere fact that the Union could affect the interval if it wished to do so casts doubt on the significance of the interval.

Because the record does not provide a basis to sort out how much of the interval should be attributed to the Respondent's decision and how much to the Union's decision, drawing any inference from the timing would involve guesswork. Such an inference would be inappropriate in this case.

The General Counsel also argues that the layoff was pretextual and that animus may be inferred from such a pretext. In considering this argument, I must follow carefully the *Wright Line* framework exactly as the Board has promulgated it. However, it concerns me that the General Counsel's argument could truncate the *Wright Line* analysis and prematurely shift the burden of going forward to the Respondent.

During oral argument, the General Counsel sought to show that site manager Christopher Langlois had not given the real reasons for laying off Pinto and Madrid while retaining other workers. In part, the General Counsel stated as follows:

> Further, Langlois testified that he kept other employees with the same grade as Pinto and Madrid, because those employees were certified to perform lead abatement, including employees Thurman Ellis, Thomas Hickman, Paris Scott, and James Sparks.
>
> Respondent, however, did not present a single document or certificate into evidence to show that Ellis, Hickman, Scott or Sparks were, indeed, certified lead abaters. Further, Respondent did not have Ellis, Hickman, Scott or Sparks appear at the hearing to testify regarding their certification in lead abatement. Therefore, the only inference that can be drawn is that Respondent used the alleged certifications as a pretextual basis to discriminatorily lay off Madrid and Pinto.

Under the *Wright Line* framework, an employer must come forward with evidence to justify an adverse action *after* the General Counsel has satisfied the initial four *Wright Line* requirements, thereby creating a presumption of unlawful motivation. However, at this point in the analysis, the General Counsel has established only the first three *Wright Line* elements. Thus, no presumption of unlawful motivation has arisen.

It certainly is true that once the government has proven the four *Wright Line* elements, a respondent then bears the burden of showing that it would have taken the same action even absent protected activities. It also is true that to make such a showing requires considerable and sometimes copious evidence. See, e.g., *Lampi LLC*, 327 NLRB 222 (1998). The sort of detailed evidence described in the General Counsel's oral argument might well be needed to rebut a presumption of unlawful motivation.

However, as noted above, the General Counsel has yet to prove the fourth *Wright Line* element and no presumption of unlawful motivation has arisen. Respondent need not present evidence to prove its motivation innocent until the government, by satisfying the *Wright Line* test, has created a presumption that the Respondent's motivation was not innocent.

The burden of coming forward with sufficient evidence to meet the *Wright Line* requirements remains on the General Counsel. The government subpoenaed a number of records and certainly could have subpoenaed the documents which, the General Counsel argues, Respondent should have introduced. If these documents had contradicted the explanation given by Respondent's managers, then the General Counsel could have offered them into evidence.

The government is not arguing that an adverse inference should be drawn because Respondent failed to produce subpoenaed records. Indeed, the evidence does not establish that the General Counsel even subpoenaed the documents it now argues that Respondent should have introduced. Rather, the government seeks an adverse inference based on Respondent's failure to do something it had no obligation to do.

In sum, the General Counsel has not shown that Respondent had any duty to present these records, either in response to a subpoena or because the burden of proceeding had shifted. Accordingly, no adverse inference is appropriate.

The General Counsel further argues that "Respondent did not have Ellis, Hickman, Scott or Sparks appear at the hearing to testify regarding their certification in lead abatement." However, the government, not the Respondent, bore the burden of establishing the fourth *Wright Line* element and the General Counsel certainly could have subpoenaed these individuals.

Moreover, based upon my observations of the witnesses, I credit Christopher Langlois's testimony. I find that he testified accurately about the reasons Respondent laid off Pinto and Madrid rather than other workers.

In other respects, the record fails to establish that antiunion animus entered into Respondent's selection of Pinto and Madrid for layoff. Accordingly, I conclude that the General

Counsel has failed to satisfy the fourth *Wright Line* requirement. Therefore, I recommend that these allegations be dismissed.

**Discharge of Chavez**

Respondent has admitted that on about April 28, 2005, it discharged employee Jorge Chavez, as alleged in Complaint paragraph 8. However, Respondent denies that it did so for unlawful reasons. Again, *Wright Line* provides the framework for analyzing this issue.

Chavez' relationship with Respondent began about December 28, 2004, when he applied for employment. That day or the next, Chavez began working for Respondent.

When he applied for work, Chavez was a Union organizer but did not disclose his Union affiliation. Based on Chavez' relationship with the Union, I conclude that the evidence has satisfied the first *Wright Line* requirement.

On February 8, 2005, the Union sent Respondent a letter identifying Chavez as its organizer. As of that date, Respondent had knowledge of Chavez' Union affiliation and activities. Thus, the government has proven the second *Wright Line* element.

Respondent's admission that it discharged Chavez on about April 28, 2005 establishes the third *Wright Line* element. Discharge certainly is an adverse employment action.

To meet its initial burden, the government also must demonstrate a connection between Chavez' protected activities and his discharge. As already noted, the Complaint does not allege that Respondent's supervisors or agents made any threat or other statement which violated Section 8(a)(1) of the Act. Additionally, the credited evidence does not reveal any other statement, even one not alleged as violative, which would suggest an unlawful motive.

During oral argument, the General Counsel asserted that Respondent engaged in a number of acts which indicate antiunion animus. However, the credited evidence does not support the government's contentions.

The General Counsel asserted that between March 1 and 23, 2005, Respondent allowed the following remark to remain visible in a work area: "If you vote union, you must be a wetback." This argument assumes that management knew about the antiunion comment but did not nothing to erase the words from the wall. The argument also posits that by knowingly allowing the words to remain, Respondent condoned or adopted them.

The record does not establish that the comment appeared in large, clearly legible letters that would be difficult to overlook. The writing was graffiti. Absent credible evidence that a supervisor or manager actually took notice of the writing on March 1, there is little reason to conclude that Respondent knowingly tolerated the antiunion message for 22 days, as the General Counsel supposes.

In other ways, the credited evidence does not support the General Counsel's argument. Indeed, even Chavez' testimony, which I do not consider reliable, indicates that once Respondent knew about the graffiti, it took prompt steps to remove it:

> **Q** When you brought it to the company's attention at the safety meeting, the wall was painted over later that day. Correct?
> **A** Yes, sir.

The government also argues that Respondent "paired the two [Hernandez and Chavez] together "and gave them work assignments away from other insulation employees. . ." The credited evidence does not support this claim. Indeed, even Chavez admitted during cross–examination that after February 8, 2005 (when his Union affiliation became known) Respondent still sometimes assigned him to work with employees other than Hernandez. Hernandez' testimony, even if credited, also would not establish that Respondent, after learning of their Union activities, isolated Chavez and him from other workers.

For example, Hernandez claimed that one job assignment was so isolated it was a 20–minute walk from that location to the shop to have lunch. However, that assignment only lasted two weeks.

Even were I to credit the testimony of Chavez and Hernandez about the location of their job assignments, no evidence establishes that management made such assignments to isolate the two from other employees, rather than because the work required employees with their skills to be in these particular locations. Because I find that Respondent did not isolate Chavez from other workers, I reject the General Counsel's argument.

Although the General Counsel further argues that the "corroborated testimony of Hernandez and Chavez establishes that Respondent sponsored an anti–union campaign," the government does not point to any specific evidence of such an antiunion campaign. Certainly, the General Counsel did not offer evidence that management distributed any antiunion literature, held captive audience speeches, posted signs, or otherwise did any of the things which typify an "antiunion campaign."

Moreover, as already discussed, I do not believe either Hernandez or Chavez gave reliable testimony. Therefore, I reject the General Counsel's argument.

The General Counsel also contends that Respondent imposed less severe discipline on certain other employees than it did on Chavez, and that animus may be inferred from this disparity. However, these other employees did not receive discipline for the same infractions and, I conclude, their situations are not comparable.

When an employer treats similarly situated workers in different ways, it is reasonable to conclude that a disparity exists which may be revealing. That, in effect, is "comparing apples with apples." However, when the two workers really are not similarly situated, examination of the disparity entails a comparison of "apples with oranges" and no meaningful inference may be drawn.

In sum, the absence of direct evidence of unlawful motivation makes it necessary for the government to argue that animus may be inferred from various circumstances. However, for the reasons discussed above, I conclude that no such inferences are warranted.

The General Counsel also raised some matters which bear no obvious relevance either to Respondent's motivation or to other issues presented by the Complaint. For example, during oral argument, the General Counsel stated:

> [T[he corroborative testimony of Norberto Hernandez and Jorge Chavez established that on March 30, 2005, foreman Brian Tranchina was present when employee Blaine Albarado made the discriminatory and derogatory remark to Hernandez and Chavez that Mexicans ride in the back of a truck. Again, the evidence reflects that Respondent took no action to enforce its policies and deter such discrimination until April 21, 2005, nearly a month later when Hernandez and Chavez demanded that Respondent do something.

The General Counsel appears to be arguing that the mere presence of a supervisor on this occasion makes it possible to attribute whatever the supervisor heard to the Respondent. Stated another way, the government is arguing that whatever the employee said must reflect management's attitude because a supervisor heard it but then did nothing.

However, even assuming that the employee made the quoted remark, and even assuming further that the supervisor heard it and said nothing to disavow the comment, it hardly would be reasonable to infer much from the supervisor's silence. Certainly, it would be a stretch to conclude that the supervisor's inaction signified that his boss, or his boss's boss, was a bigot.

For the sake of analysis, however, let us assume that such an inference appropriately could be drawn. Doing so would lead only to the conclusion that some members of management suffered from a prejudice which might cause them to discriminate on the basis of ethnicity or national origin. Even this conclusion, which I consider unwarranted, doesn't move the government any closer to establishing the motivation at issue here, antiunion animus.

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." Even assuming that the General Counsel had shown that members of Respondent's management might discriminate on the basis of national origin, proving such a prejudice would neither make more likely nor less likely any matter raised by the Complaint.

To summarize, it would be unreasonable to attribute an employee's remark to management simply because a supervisor heard it. Moreover, the remark in question, even if established, did not pertain to any disputed issue in this case. It did not constitute relevant evidence under Rule 401.

Because the testimony about the "Mexicans ride in the back" remark is irrelevant, I need not add that I do not believe Hernandez and Chavez to be reliable witnesses.

In oral argument, the General Counsel also pointed to another claimed incident in the workplace which, I conclude, fails to meet the relevancy standard established by Rule 401. Based

on this reputed incident, the government argues that Hernandez was a "victim of sexual harassment."

From the evidence, it is far from clear that the incident in question, involving a coworker of the same gender as Hernandez, amounted to "sexual harassment" in the legal sense. When one man grabs another man's buttocks, it cannot be presumed that the contact signifies sexual harassment rather than common horseplay which occasionally occurs in the workplace.

However, for the sake of analysis let us assume that the incident amounted to "sexual harassment." The General Counsel has not explained how such "sexual harassment" makes any more likely, or less likely, the existence of antiunion animus.

The credited evidence does not establish that Respondent enforced its policies any differently when the horseplay (or "harassment") involved Hernandez or Chavez rather than some other employee. I conclude that neither the incident itself nor management's response to it sheds any light on the issue of antiunion motivation.

Additionally, the General Counsel asserts that Respondent "divided employees according to race." No credited evidence supports such a claim and I find it to be untrue. However, even if some believable evidence had made this claim more respectable, it would not have made the assertion more relevant. Proof of racial discrimination does not itself establish antiunion animus.

In sum, credible evidence does not support either the General Counsel's relevant or irrelevant arguments. I conclude that the government has not proven the fourth *Wright Line* element. Therefore, I recommend that the Board dismiss the allegation that Respondent's discharge of Chavez violated the Act.

**Norberto Hernandez**

Complaint paragraphs 9 and 10 allege that employee Norberto Hernandez engaged in an unfair labor practice strike from about May 2, 2005 to about May 9, 2005. Complaint paragraph 11 alleges that on about May 9, 2005, Hernandez made an unconditional offer to return to work. Respondent denies all of these allegations.

Complaint paragraph 12 alleges that since about May 9, 2005, Respondent has refused to reinstate Hernandez. Respondent's Answer admits this allegation, and further asserts that Respondent had no obligation to reinstate Hernandez.

Complaint paragraph 13 alleges that on about May 9, 2005, Respondent discharged Hernandez. Respondent admits that it discharged Hernandez three days earlier, on May 6, 2005. Complaint paragraph 14, which Respondent denies, alleges that it discharged Hernandez because of his Union activities and other protected activities.

On January 5, 2005, Hernandez went to Respondent's office to apply for work as a "mechanic insulator." At that time, Hernandez was a Union organizer, but he did not disclose his Union affiliation. Respondent hired him and he went to work at a jobsite on January 10, 2005.

On February 16, 2005, the Union sent Respondent by fax a letter identifying Hernandez as one of its organizers. According to Hernandez, on that same day he wore a Union shirt to work and talked to employees about the Union during the lunch break. (Hernandez' testimony suggests that other people could not tell that he was wearing a Union shirt until he took off his overalls at lunch.)

Hernandez testified that after lunch, Respondent assigned him to work with a different crew. Thereafter, according to Hernandez, management assigned Chavez and him to work at a location isolated from other employees.

The Complaint does not allege that Respondent unlawfully isolated either Hernandez or Chavez, but the General Counsel points to their work assignments as proof of antiunion animus. For the reasons discussed above, I have concluded that Respondent did not assign Hernandez and Chavez work at remote locations to prevent them from interacting with other employees. Therefore, I reject the General Counsel's argument that the work assignments suggest animus.

Hernandez testified that on May 2, 2005, he told General Foreman Larry Usea that he was "going on a strike for unfair labor practice." According to Usea, Hernandez did not say he was going on an "unfair labor practice strike" but only said that he was going on strike. For the reasons discussed above, I do not believe that Hernandez was a reliable witness. Crediting Usea, I find that Hernandez only told Usea that he was going "on strike," and did not say that he was going on an "unfair labor practice strike."

After informing Usea that he was going "on strike," Hernandez left the jobsite. The next day, he picketed the jobsite for about an hour and a half. There were a number of other pickets, none of whom worked for Respondent.

The Complaint alleges that Hernandez was an unfair labor practice striker and that he made an unconditional offer to return to work on May 9, 2005. Unlike economic strikers, an unfair labor practice striker is entitled to immediate reinstatement upon the striker's unconditional offer to return to work. *The Wilkie Co.*, 337 NLRB 806 (2002). Therefore, Respondent's admitted failure to reinstate Hernandez would be an unfair labor practice if the evidence establishes that Hernandez was, in fact, an unfair labor practice striker.

Before the government can prove Hernandez to be an unfair labor practice striker, it must first establish that there has been an unfair labor practice strike. Before the government can prove there was an unfair labor practice strike, it must show that there were, in fact, some unfair labor practice. Because the General Counsel has not proven any unfair labor practices, I must conclude that there was no unfair labor practice strike and, accordingly, that Hernandez was not an unfair labor practice striker.

Moreover, establishing that an employer committed unfair labor practices only constitutes one element needed to prove an unfair labor practice strike. The government also must establish that there was a strike, and that the unfair labor practices wholly or partially caused or prolonged the strike. *Precision Concrete*, 337 NLRB 211 (2001); *Citizens National Bank of Willmar*, 245 NLRB 389, 391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981). Even were we to assume for analysis

that the picketing constituted some kind of "strike," credible evidence fails to establish that any unfair labor practices caused or prolonged it.

Demonstrating a causal connection between a strike and an unfair labor practice requires more than proving that one followed the other. As the Board stated in *Chromalloy American Corp.*, 286 NLRB 868 (1987), "the Board has long recognized that unfair labor practices may precede a strike without being a cause of the strike. A causal connection between the unfair labor practices and the strike must be demonstrated in order to establish that employees are unfair labor practice strikers." 286 NLRB at 873 (footnote omitted).

For the reasons discussed above, I do not credit Hernandez' claim that he announced he was going on an unfair labor practice strike. Rather, I have found that he only said that he was going "on strike." However, crediting his testimony on this point would make little difference. The words "I'm going on an unfair labor practice strike" do not, without more, establish the necessary cause and effect relationship.

Photographs establish that the pickets carried signs with the legend "unfair labor practice strike." If other evidence provided insight into what motivated the picketing, then the legend on the signs might have probative value. However, the circumstances do not warrant taking the signs at face value.

Only one employee of Respondent – Hernandez – walked the picket line. Yet one of the photographs shows 21 people. Whoever the other 20 people might be, they did not work for Respondent.

One would presume that Respondent's employees would have the strongest interest in protesting any unfair labor practices. So it seems somewhat unusual that 20 people who did not work for this employer – and therefore were not directly affected by the claimed unfair labor practices – should picket the jobsite when only one person who had firsthand experience of the working conditions took the time to show up.

Such curious circumstances justify more than average curiosity. If someone whispered me into an alley and offered to sell me a brand name Swiss watch for 5 dollars, it would cross my mind that maybe the label didn't match the product. Here, it is appropriate to wonder if the label on the signs disclosed the purpose of the pickets.

Two of the pickets – Hernandez and Union organizer Maximos Perdomo – testified during the hearing. Neither one explained how the pickets came to be at the jobsite. That itself is unusual.

Typically, in a case involving an alleged unfair labor practice strike, strikers provide considerable testimony linking the employer's conduct with the decision to strike or to remain on strike. Sometimes, this testimony becomes rather vivid as witnesses describe emotional union meetings at which employees expressed strong feelings about the way their employer had treated them. But even when the testimony isn't particularly dramatic, the government develops the link between cause and effect as plainly as the facts allow.

Here, that link is missing. No evidence reveals the motivation of the 20 pickets who had never worked for Respondent and thus had no direct knowledge of how Respondent treated its employees. The record also does not indicate what the pickets had been told by someone else. Absent evidence about what prompted the picketing, I must conclude that there was no unfair labor practice strike.

Because Hernandez was not an unfair labor practice striker, Respondent had no duty to reinstate him when he offered to return to work. Therefore, I must reject the General Counsel's argument that such a refusal to reinstate violated the Act.

However, the Complaint also alleges other unlawful discrimination against Hernandez. Those allegations – that Respondent discharged Hernandez unlawfully because of his Union and protected concerted activities – will now be considered.

At the outset, I conclude that Hernandez' picketing does constitute "concerted activity" because the other pickets, or at least some of them, enjoyed the status of "employee" under the Act. Specifically, Section 2(3) of the Act states, in part, that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer. . ." 29 U.S.C. Section 152(3). That definition is broad and very likely covers at least some of the pickets. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

To prevail, however, the General Counsel must do more than prove that Hernandez engaged in concerted activity with other employees. The government also must establish that such activity enjoyed the protection of the Act. In other words, the activity must fall within the ambit of Section 7 of the Act, which gives employees the right to:

> self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . 29 U.S.C. Sec. 157.

The General Counsel bears the burden of proving that Hernandez engaged in some activity within the meaning of these words. In analyzing this issue we may, for convenience, separate the activities protected by Section 7 into two categories: (1) Union activity, and (2) other concerted activity "for the purpose of collective bargaining or other mutual aid or protection." First, let us examine whether the government has proven that this picketing constituted Union activity.

Credited evidence does not prove that the pickets had any connection with a labor organization, which, as discussed above, is "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. Section 152(5).

Notwithstanding my concern that the record says little about the Charging Party's purposes and activities, I will assume here that it meets the statutory definition of "labor organization." However, the evidence does not establish what role, if any, the Charging Party played in the picketing of Respondent.

Two of the men who participated in the picketing – Hernandez and Perdomo – testified at the hearing. The Union employed both of them as organizers, so they had some familiarity with the Union's operations. However, neither Hernandez nor Perdomo said anything on the witness stand which would link the Union to the pickets.

Perdomo did not testify that he participated in the picketing because the Union instructed him to do so. Likewise, he did not state that any Union official encouraged him to picket. Indeed, Perdomo's testimony makes no reference at all to the May 2005 picketing. That testimony does not support a conclusion that the Charging Party sponsored, endorsed or encouraged the picketing in any way.

Although Hernandez, like Perdomo, was a Union organizer, his testimony also fails to establish that the May 2005 picketing was a Union activity. Hernandez did testify that he discussed Chavez' discharge with Perdomo, but nothing in this testimony indicates that they had this conversation in the course of their employment as Union organizers. If anything, Hernandez depicted the "strike" as his own action, rather than that of any group.

**Q** And what was discussed? What did you discuss with Mr. Perdomo?
**A** That we want to go — I was going to go on strike for ULP.

For whatever reason, Hernandez corrected his initial use of the word "we" by substituting "I." Hernandez did not state that the Union was calling or engaging in a strike which he intended to join.

Moreover, Hernandez' initial use of the word "we" does not establish Union involvement. Nothing in the record indicates that Hernandez intended the word to refer to the Union, rather than to the men who carried the picket signs. The record does not establish that the Union caused these picketers to be at the jobsite or supported their activity.

Of course, experience teaches that when pickets show up at a jobsite, one certainly would expect them to have some relationship to a union. In the present case, however, expectations are not always a reliable guide.

For example, Hernandez stood to gain by characterizing the picketing as a Union activity and therefore protected by the Act. A showing that Hernandez had engaged in protected activity only a few days before his discharge would bolster a conclusion that the protected activity had influenced the discharge decision. Testimony that the pickets were acting on behalf of the Union foreseeably would help establish that, when he joined the picketing, Hernandez was engaging in protected Union activity. Thus, such testimony would make more likely a Board order requiring Respondent to reinstate Hernandez with backpay.

Moreover, my assessment of Hernandez' credibility leads me to believe that he would rather give testimony advancing his self interest than testimony having the opposite effect. Stated another way, it seems more likely that he would keep silent on a point not favoring his self interest than on a point advancing it. But notwithstanding the incentive to link the picketing with the Union, Hernandez did not do so.

Additionally, Hernandez was not the only witness to have direct knowledge of the picketing. As already discussed, Perdomo also picketed and his testimony also fails to establish that the Union planned, sponsored, supported or even gave its blessing to the picketing.

Therefore, I conclude that a preponderance of the evidence does not establish that the individuals who picketed Respondent in May 2005 were acting on the instructions of the Charging Party or other labor organization. Likewise, I conclude that a preponderance of the evidence fails to establish that these pickets were agents of the Charging Party or acting at its behest. Accordingly, I further conclude that Hernandez' participation in the picketing did not constitute activity to "assist a labor organization."

Having concluded that the credited evidence is insufficient to establish that Hernandez engaged in union activity on this occasion, I now will consider whether he was engaged in other protected, concerted activity for the purpose of collective bargaining or other mutual aid or protection. Again, for reasons already discussed, I will continue to assume that for a person's conduct to be protected, he does not have to perform the activity in concert with other employees *of his own employer*. Rather, it suffices for the person to engage in the concerted activity with anyone who meets the broad definition of "employee" set forth in Section 2(3) of the Act.

The record provides no basis to conclude that Hernandez picketed for the purpose of collective bargaining. Moreover, credible evidence does not establish that Hernandez was acting in concert with the pickets for other mutual aid or protection.

Hernandez has claimed only one motivation for his picketing: Protesting the discharge of Chavez as an unfair labor practice. However, for the reasons discussed above, I have concluded that Respondent's discharge of Chavez did not violate the Act.

Even though the picketing did not constitute an unfair labor practice strike, it still might constitute protected activity for mutual aid or protection if intended to improve working conditions. For example, if employees truly picketed with an object of protesting a discharge as "unfair," that picketing would be for their mutual aid or protection even if the "unfairness" did not constitute an unfair labor practice. Thus, such picketing would enjoy the Act's protection regardless of whether it constituted an unfair labor practice strike.

However, for the reasons discussed above, I do not believe Hernandez to be a reliable witness and have not credited his testimony. Moreover, Hernandez' explanation of why he decided to go "on strike" is particularly difficult to accept at face value because it is so conclusory:

**Q** And what did you think about Mr. Chavez' termination?
**A** That it was unfair, the way they terminate him.
**Q** Did you think it was a violation of the National Labor Relations Act?
**A** Yes.

Hernandez did not elaborate either on why he considered Chavez' discharge to be unfair or why he believed it to violate the National Labor Relations Act. On the latter point, he gave only a one word answer in response to a somewhat leading question.

The brief and conclusory nature of this testimony provides no reason to believe that it is any more reliable than Hernandez' other testimony, which I have not credited. Accordingly, I cannot find that he left work and picketed for the reason he claimed.

In sum, credible evidence does not establish that Hernandez' activity – leaving work on May 2, 2005 and thereafter picketing Respondent – was to form, join or assist a labor organization or to engage in collective bargaining. Similarly, credible evidence does not prove that Hernandez engaged in this activity for the purpose of other mutual aid or protection.

However, there is one other possibility. The record establishes that Hernandez had engaged in earlier protected activity, trying to persuade employees to support the Union and, beginning February 26, 2005, wearing Union insignia at work. The Act could protect Hernandez' activity on May 2, 2005 and thereafter if it constituted a continuation of this earlier protected activity. *Manno Electric*, 321 NLRB 278 (1996).

In *Manno Electric*, the Board found that an employee's "individual job action," walking off a job to which he had been discriminatorily assigned, was protected because it was a continuation of the employee's prior group activity and because it was in response to his employer's unlawful discrimination. That case, in my view, does not fit the present facts.

Hernandez did not claim that he engaged in the May 2005 "strike" for an organizing purpose. Accordingly, it is difficult to view this cessation of work and picketing as a continuation of earlier efforts to "sell" employees on the Union. Also, unlike *Manno Electric*, the Respondent here had not discriminated unlawfully or committed other unfair labor practices. Accordingly, I do not conclude that Hernandez' cessation of work and picketing in May 2005 constituted a continuation of his earlier protected activity. See generally *Lin R. Rogers Electrical Contracztors, Inc.*, 323 NLRB 988 (1997).

Nonetheless, the government has satisfied the first *Wright Line* requirement by showing that Hernandez had engaged in these earlier protected activities. The record establishes that Hernandez tried to convince employees to support the Union and, beginning February 16, 2005, wore union insignia at work.

Moreover, the General Counsel also has proven the second *Wright Line* element, employer knowledge. Beginning on February 16, 2005, Hernandez' attire made his union affiliation obvious and unmistakable, On that same date, the Union sent Respondent a letter identifying Hernandez as its organizer. Then, if not earlier, Respondent knew about Hernandez' union activities.

Respondent's admission that it discharged Hernandez on May 9, 2005 establishes the third *Wright Line* element.

Finally, *Wright Line* requires the General Counsel to prove a link between the protected activity and the adverse employment action. However, no persuasive evidence establishes such a connection.

Certainly, unlawful motivation cannot be inferred from the timing. Although Respondent became aware of Hernandez' Union affiliation in February 2005, it did not discharge him until almost 3 months later.

In deciding whether the interval between employer knowledge and discharge is short enough to suggest a connection, all the circumstances must be considered. If the record includes direct evidence of employer hostility to a union, such as evidence of unlawful threats or interrogations, there is reason to believe that this antagonism might persist. As the evidence of such animus increases, so does the possibility that it lasted long enough to influence the discharge decision.

In the present case, we are looking for evidence of animus strong enough to extend from February 16, 2005, when Respondent learned of Hernandez' union activities, until May, when it decided to discharge him. However, the record does not reveal such animus. Moreover, the Complaint itself does not allege any independent 8(a)(1) violations. It is difficult to believe that some coals of animus remained smoldering for two and one–half months when, in fact, the record doesn't establish that there had ever been a fire.

The timing suggests only one proximate cause of Hernandez' discharge, namely, his walking off the job on May 2, 2005 and his absence from work thereafter. For the reasons discussed above, I have concluded that the Act did not protect this activity.

In other respects, credible evidence does not prove a link between Hernandez' union activities and the decision to discharge him. Therefore, I conclude that the General Counsel has not satisfied the fourth *Wright Line* requirement.

Accordingly, I further conclude that Respondent did not discharge Hernandez unlawfully. As discussed above, I have also concluded that Respondent's refusal to reinstate Hernandez when he offered to return to work was lawful because Hernandez was not an unfair labor practice striker. Therefore, I recommend that the Board dismiss all of these allegations.

However, should the Board conclude that Hernandez' cessation of work on May 2, 2005 and his subsequent picketing do enjoy the protection of the Act, I would recommend that it find his discharge violative. The proximity of his May 6, 2005 discharge to those activities would establish the nexus required to satisfy the final *Wright Line* element.

At that point, Respondent would assume the burden of presenting evidence to establish that it would have discharged Hernandez in any event, even in the absence of his protected activity. In my view, Respondent would not be able to carry that burden with the evidence presently in the record.

To summarize, my conclusion that Respondent lawfully discharged Hernandez depends upon whether the Act protected his May 2, 2005 work cessation and subsequent picketing. Because I believe these activities unprotected, I recommend that the Board find no violation. However, an opposite conclusion regarding the protection due those activities would necessitate the further conclusion that Respondent discharged Hernandez unlawfully.

## Conclusions of Law

1. The Respondent, Basic Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent did not violate the Act in any manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]:

## ORDER

The Complaint is dismissed.

Dated Washington, D.C., May 23, 2006.

**Keltner W. Locke**
**Administrative Law Judge**

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.